No. 3933

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of EARL N. McKINNEY, Bankrupt.
WILLIAM COWAN,

Appellant and Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the Matter of EARL N. McKINNEY, Bankrupt,

Appellee and Respondent.

Brief of Appellant and Petitioner

Upon Appeal and Petition for Revision from the United States District Court of the District of Arizona.

Mr. David Benshimol, of Douglas, Arizona
Mr. Oscar T. Barber, of San Francisco, California
Attorneys for Appellant
and Petitioner

Filed this....., 1923.

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Clerk U. S. District Court of
Appeals, Ninth Circuit..

Service of two copies of within Brief of Appellant and Petitioner is hereby acknowledged this

....., 1923.

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Attorney for Apellee and Respondent.

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Statement of Case.

On the 9th day of April, 1918, Earl N. McKinney filed in the District Court of the United States for the District of Arizona his petition in voluntary bankruptcy, (Transcript page 1) and by judgment of said District Court as aforesaid, was, on or about the 26th day of April, 1918, adjudicated a bankrupt; (Transcript, page II) that thereafter and in due course the administration of the estate of said bankrupt, one John P. Cull was by proper order and judgment of said United States District Court appointed trustee in bankruptcy for the estate of the said bankrupt,

That thereafter your petitioner was cited to appear as a witness before the Referee in bankruptcy on the 22d day of December, 1919, and testify re-

garding his several transactions with the said bankrupt; that on said date your petitioner duly appeared as a witness and was examined by said Referee regarding said transactions. (Transcript pages 50 and 51);

That thereafter, on the 16th day of February, 1920, said referee ordered your petitioner to appear before him at Douglas, Arizona, (Transcript page 78) on the 8th day of March, 1920, and show cause why your petitioner should not pay over to the estate of the bankrupt the sum of Five Thousand Thirty-Eight and 41/100 ($5,038.41) Dollars. The Referee was not present until March 9th, 1920, on which date your petitioner and Appellant (Transcript of Record, page 79) specially appeared under protest for the purpose of pleading to the jurisdiction of said Referee, and of the said District Court, in the premises, setting forth the grounds for his plea of want of jurisdiction in said Referee and in said Court, (Transcript of Record, page 62) which said objection to jurisdiction was overruled by said Referee; and thereupon, under protest, your petitioner filed his answer to the Referee's Findings on Notice to Show Cause, showing among other things the following:

That he had not proved any claim against the estate of the bankrupt; that he did not owe the bankrupt or his estate anything; that any property he had in his possession had been delivered to him by the bankrupt under certain mortgages given by the bankrupt for valuable consideration long prior to the adjudication of the bankrupt in bankruptcy; that suit to foreclose these mortgages

had been begun several months prior to adjudications; that while pending there was an accounting and that an agreement for judgment was signed and filed in the pending suit; that subsequent to the adjudication and immediately after his appointment the trustee had been urged to take action relative to the property under foreclosure covered by the mortgages or relinquish any interest in the estate therein; that for more than six months after the adjudication the trustee failed to take any action whatever; that no appraisal of the bankrupt's estate or the property involved in the mortgages of this Appellant and Petitioner, has ever been made; that on the 16th day of December, 1918, said Cowan filed his formal judgment in the suit to foreclose; that prior to the date advertised for the sale the trustee brought suit in the Superior Court of Cochise County for an accounting for all the property covered by said mortgages and brought in said Superior Court a second suit to enjoin the sale on execution of the properties covered by said mortgages, on the 13th day of January, 1919, and secured an order from said Superior Court restraining the sale; that these two actions concerned the very matters involved in the show cause order above referred to and covered all the transactions between the bankrupt and said Cowan; that both of these actions were demurred to for want of equity and demurrers sustained; that the trustee appealed to the Supreme Court of the State of Arizona, from the order of the Superior Court sustaining the demurrer, to the action to restrain the foreclosure sale and from an order of said Court dis-

solving the restraining order, but did not perfect his appeal and dismissed both actions about November 1st, 1919; that the said Cowan thereupon proceeded to readvertise and sell under his execution; that the expense and upkeep of the property covered by said mortgages, cattle mostly, during said delays, was much in excess of any income derived from them; that the trustee had been guilty of laches and was seeking to profit by the expenditure of time and money by said Cowan in the care of and upkeep of the property in question without offering to do equity.

That on the 8th day of May, 1920, the Referee entered an order denying petition of Trustee for want of Jurisdiction. (Transcript of Record, page 66); that thereafter, to-wit: under date of May 16th, 1921, nearly a year after, the said Referee made certain Findings of Fact and Conclusions of law, finding and concluding your petitioner to be indebted to the estate of said bankrupt in the sum of Four Thousand Seven Hundred Five and 55/100 ($4,705.55) Dollars, and recommending that the said District Court docket the matter, and render judgment for said sum of Four Thousand Seven Hundred Five and 55/100 ($4,705.55) Dollars against said William Cowan, and in favor of said John P. Cull. (Transcript of Record, page 82).

That your petitioner immediately after receipt from the Referee of said findings of fact and conclusions of law, filed his certain petition for review in said District Court, (Transcript of Record, pages 88 to 168) moving that the entire proceedings of the Referee relative to the matter and things set

forth in the Referee's said findings of fact and conclusions of law on William Cowan's citation, dated May 16th, 1921, and which were mailed on June 22d, 1921 to, and received by, said William Cowan's attorney on June 23d, 1921, be reviewed. (See also Petition for Revision, pages 4-5).

Such proceedings were had on said petition for Review, that on September 5th, 1922, the said District Court being of the opinion that the Referee was within his rights and had proceeded lawfully in instituting summary proceedings, ordered, adjudged and decreed that the said findings of fact and conclusions of law made by the Referee be affirmed. (Transcript, pages 175-176).

Thereupon your petitioner and Appellant considering himself aggrieved by this order of the District Court respectfully applies to this Honorable Court for a revision and review of said order and appeals therefrom.

SPECIFICATION OF ERRORS.

I.

The Court erred in affirming the findings of fact and conclusions of law made by the Referee (Transcript of Record, page 82) for the reasons that:

A. (a) The referee had no jurisdiction in the matter involved,

(b) The said William Cowan objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee,

(c) The said William Cowan has never consented thereto.

B. That the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee to pass upon in a summary proceeding.

C. That the said William Cowan has not submitted himself and did not submit himself to the jurisdiction of the referee or the District Court except so far as was necessary for said Court to determine whether it had jurisdiction herein.

D. That the said referee and the District Court have no jurisdiction herein because the proceedings are not summary proceedings.

E. That this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

F. That the said referee's overruling of objection to jurisdiction (Transcript of Record, page 86 paragraph VII) made by said William Cowan, was, for the matters herein recited, without legal effect.

G. That no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

H. That the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

II.

The Court erred in affirming the findings of

fact and conclusions of law made by the referee for the reason:

A. That the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to-wit: an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November, 1918, a certified copy of which is included in the record herein, (Transcript of Record, pages 94 to 136) and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein, (Transcript of Record, pages 137 to 168) and the trustee having elected to pursue these matters in the Superior Court of Cochise County, is estopped to prosecute them elsewhere.

III.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason:

A. That certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to-wit: that there were earnings from

the cattle or benefits from the property. (Transcript, page 85).

B. That the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-Five and 58/100 ($1,265.58) Dollars was unaccounted for.

IV.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason:

That there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

V.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that:

The trustee took no steps to redeem said property, and is guilty of laches; he also abandoned the suits.

ARGUMENT.

SPECIFICATION I.

It will be seen by reference to Transcript of Record, page 87, that there is no fraudulent preference or transfer involved herein; that there is no property right or right to possession involved and that the amount of money which is involved ($4,705.55) is made of two items, first; $1,265.58,

(Transcript, page 85) from dealings long before the bankruptcy and long before the suit referred to (See page 94, Transcript of Record) was filed, in which later suit an accounting of all matters was had with bankrupt, adjustments were made (See pages 120-121, Transcript of Record) and a confession of judgment entered; and secondly, from an amount charged by the referee as interest as against Appellant. (See also Transcript page 56).

A. The Court in re Wood, 278 Fed. 355, says:

> "It is within the power of the bankruptcy court to assert and exercise a summary power over the property of a bankrupt or even of third persons holding property and claiming title, **provided** such claim is merely colorable or fraudulent. But inasmuch as such proceedings deprives a person of the usual due process of law, a summary order directing its surrender should be based upon facts which no fair mind can dispute." Citing Louisville Trust vs. Cominger, 184 U. S. 24, (46 L. Ed. 413) and "It was never intended to deprive third parties, claiming property, of which they were in full possession, of the usual and due process of law." Citing Marshall vs. Knox, 16 Wall. 551 (21 L. Ed. 481)
>
> The Court on page 358 further says: "these and other questions—satisfy us the petitioners have a defense to the claim—and which they are now in part directed to pay over to the trustee. It is more than colorable, and is substantial. **It is a controversy** which should be determined in a plenary action and not by summary order."

In the instant case Cowan claims and contends that he owes and owed McKinney nothing. (See also Transcript page 69, last paragraph). That during the accounting all items were accounted for; that there was an accounting. Cowan also contends that the referee's finding that the "use and benefit of the property should have more than paid the interest" (Transcript page 85, paragraph 5) raise clear controversies, properly to be adjudicated in a plenary action, especially since, as to this latter item there is no evidence and the charge of $3,439.97 against Cowan is based upon an assumption of the referee.

See Weidhorn vs. Levy, 64 Law Ed. 898, which in its initial proceedings is very like this case. There the Petitioner objected to the jurisdiction and answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits and entered a decree in favor of the trustee. No bill in equity to the referee is found in this case. The referee, issuing his show cause order. (Transcript, page 78, at foot, also Transcript, page 61-9th line, et seq). See also in re Wood, Supra. In this case the property is not in the possession or control of the Court or bankrupt or anyone representing him at the time of filing bankrupt's petition, and not in the Court's custody at the time this controversy began or now. It involves nothing in the nature of a lien. A plenary suit is the only remedy.

> See Babbit vs. Dutcher, 216 U. S. 102, 54 Law Ed. 402-406.

There is nothing in the Bankruptcy Act that extends the powers of the referee to cases like the present one.

Weidhorn vs. Levy, Supra, page 901.

(b-c) Cowan objected to the referee taking jurisdiction.

It will be noted that on **May 8, 1920,** the referee on **Trustee's** petition for an order to turn over all the proceeds of the sale of the property of the bankrupt, denied the motion for want of jurisdiction. (Transcript, page 66). It will also be noted that so far as Cowan is concerned, after the hearing, on **March 9th, 1920, nothing was done by the referee on this matter** until May 16, 1921, when the referee filed Findings of Fact and Conclusions of Law (Transcript, page 82). Memory only of the referee, seems to have been relied on, for on March 9th, 1919, Cowan objected to and protested his jurisdiction vigorously and did not give consent thereto or waive it.

It will be furthermore noted, that on March 9th, 1920, Cowan (Transcript, page 62) specially appeared under protest—and ever since has protested—the jurisdiction and procedure of the referee.

There is not even the pleading or petition of the Trustee attempted in the case of Weidhorn vs. Levy, Supra.

In a similar case the Court says in Galbraith vs. Vallely, 65 Law Ed. 843, while it might afford a more speedy and economical administration of the estate to maintain a summary proceeding such as this "the right to recover in such instances only

in suits of the ordinary character with rights and remedies incident thereto has been consistently maintained by this Court"—referring of course, to plenary suits. In the above mentioned case, the protest was intervened to the authority, as in this. (Page 79, Transcript and page 62). The record shows no waiver of objection or application for relief except as to jurisdiction—nor consent to jurisdiction. There is no record of any testimony on March 9th. (See Transcript 67-70).

SPECIFICATION I, (B to F inclusive).

An examination of the Bankruptcy Act clearly indicates the powers of the referee.

Consent was not given—protest against the referee taking jurisdiction was duly made (Transcript page 62-65)—in the proceeding no claim of fraud or fraudulent preference is made—no proceedings for the turning over to the trustee of property that belonged to the bankrupt's estate is indicated, but this is a proceeding to obtain from Cowan an accounting and the collection of an alleged sum of money, which after considering and reducing to a finality, certain transactions, might be found to be due the bankrupt's estate. Cowan's position since the start, has been as an adverse holder and as owing nothing. His position, as shown in Specification I, B to F, is that he is entitled to meet the claims made against him ,in a plenary action, that the subject matter of the claims made must be tried to a Court or jury.

Louisville Trust vs. Cominger, Supra.
Weidhorn vs. Levy, Supra.
Galbraith vs. Vallely, Supra.
In re Rathman, 183 Fed. 913. A very instructive case upon the matter in controversy.
Murphy vs. Hoffman Co., 211, U. S. 562.
Whitney vs. Wenman, 198 U. S. 539.
White vs. Schloerb, 178 U. S. 542.

A plenary suit must be brought by the trustee, either in law or equity, and in a Court of proper jurisdiction.

Babbit vs. Dutcher, 216, U. S. 113.
Mima vs. Parham, 193 Fed. 276.
Johnston vs. Spencer, 193 Fed. 275.
First National Bank vs. Hopkins, 199 Fed. 873.

United States Compiled Statutes, 1916, Vol. 9, (Sec. 9607), page 11332,

See citations as to waiver or consent:

"A respondent who files a paper in which he sets up that the Court is without jurisdiction of the action, and who repeats and urges the same objection in a proceeding to have the judge of the Court of bankruptcy review a decision of the referee adverse to him, cannot be said to have consented to the jurisdiction, although he also excepts to the petition as not stating a cause of action and further pleads a general denial." Citing in re Michie, 116 Fed. 749.

"The consent of a defendant to be sued in the court of bankruptcy means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of

law, unless other provision is made." Citing In re Raphael, 192 Fed. 874. "And if the mode of procedure adopted is unlawful, the appearance of the defendant and his contesting the proceedings will not confer jurisdiction." Citing Sinsheimer vs. Simonson, 107 Fed. 898.

SPECIFICATION I. G.

It must be clear upon examination of the findings, that the referee from the facts set out, has attempted to determine that as a result of certain dealings, a debt is due the bankrupt's estate and how much. (See Transcript, pages 82 to 88).

United States Compiled Statutes, 1916, Vol. 9, (Sec. 9607), page 11326:

> "If it shall be determined that the respondent's claim to the property is genuine and interposed in good faith and with the intention of supporting it, the court cannot proceed to inquire into the merits, but must dismiss the petition and remit the trustee to his remedy by a plenary suit. Citing In re Rathman, 183 Fed. 913; In re Norris, 177 Fed. 598; In re Hayden, 172 Fed. 623; In re Ellis Bros., 156 Fed. 430; In re Gilroy & Bloomfield, 140 Fed 733; In re Kane, 131 Fed. 386; In re Teschmacher & Mrazay, 127 Fed. 728; In re Breslauer, 121 Fed. 910; In re Baird, 116 Fed. 765; In re Tune, 115 Fed. 906; In re Radley Steel Const. Co., 212 Fed. 462; Courtney vs. Shea, 225 Fed. 358.
>
> "If the respondent's plea sets forth facts showing that his claim is adverse and in good faith, the trustee should file a pleading denying the averments relating to this point, and

an issue should be framed as to whether the claim pleaded is substantial or merely colorable, and this point should be decided on investigation; it is error simply to overrule the plea and proceed to judgment." Citing In re Gill, 190 Fed. 726; In re Goldstein, 216 Fed. 889.

"If there is nothing to impeach the good faith of the claim, and it is substantiated by verified pleadings or oral testimony, the issue cannot be heard summarily. (In re Kane, 131 Fed. 386). In fact, it has been said that it is only in clear cases, in which the proof is decisive, that the Court of bankruptcy is justified in making a peremptory order for the surrender of property." In re Gilroy & Bloomfield, 140 Fed 733.

SPECIFICATION I. H.

If the Trustee has a right to demand an accounting for the proceeds of the sale under foreclosure, then one of two things must be conceded; either the Trustee consented to the foreclosure after attempting to enjoin it, or tacitly, from his action, he must have abandoned any interest in the mortgaged property, for from the date of his appointment as trustee, April 27, 1918, until sometime after February 16, 1920, (Transcript, page 78) when the show cause order was issued to be served on this appellant—and from the date of the service of that show cause order to sometime after May 16th, 1921, more than two years after the trustee's appointment, he never attempted to take charge of said mortgaged property—put up any money to feed or care for the cattle or pay any

taxes upon the mortgaged real estate—all of which items undoubtedly this appellant would be entitled to credit for in any accounting had—in a plenary suit. Nor since said date has said trustee offered to, in any way, assume or pay the expense of maintenance of said properties.

Neither has the referee a right in a summary proceeding to dispose of the contention, that there had been an accounting between the bankrupt and the Appellant, as shown (Transcript, page 121). The appellant and petitioner contended that all accounts had been gone over. Even as to this the appellant would have been entitled to have been heard, in a plenary action, as to whether there was such an accounting—as to whether it was just and if it had been erroneously made.

Nor does the record disclose that there was any evidence of what the property in the hands of Cowan was actually worth at the time the petition of McKinney was filed. It is true that Cowan calculated interest upon the capital involved down to the date of the foreclosure sale, but in reason and therefore requiring proper evidence to disclose it, the **property** involved, earned a profit or made a loss up to the time of the foreclosure sale. The bankrupt's own testimony showed no income (while he had it) from the property as the expenses were equal to receipts (Transcript, page 29). Nowhere in the record is there evidence upon which the referee or this Court could determine that there were earnings or that because he, Cowan, was negligent, there should have been earnings. These are

matters that should be adjudicated in a plenary action.

Which ever way one turns, examining the facts in this case, the matter discloses that the matter in controversy must proceed as a plenary action.

The facts in this case reveal a somewhat similar position to that of the defendant in Boston-Cerrillos Mines Corporation, 206 Fed. 794. In that case if there had not been diversity of citizenship, the case could have proceeded as a summary one. Quoting the Court on page 797:

> "It is true that under Sec. 23, of the Bankruptcy Act, a plenary suit of this character may not be prosecuted in the Federal Courts (save by consent) unless it be such a case as, had no bankruptcy supervened, might have been prosecuted in the Federal Court. But this seems to be such a case."

Then follows the proposition of the diverse citizenship and jurisdictional amount.

SPECIFICATION II.

This case is in this court both on appeal and petition for revision.

Attention is called to the following facts, to-wit: that the trustee under instructions from the referee, brought suit in the Superior Court of Cochise County, Arizona, against this defendant for $48,475; for an accounting and for adjustment of all claims between the parties (Transcript, page 94-

104) which suit was filed November 30th, 1918. An examination of the pleadings in that case, will disclose that the trustee was fully informed of the history of the transactions between the bankrupt and the said Cowan.

An examination of the answer (Transcript, page 126) and also the Record of proceeding had before the referee (Transcript, pages 71 to 81, and pages 188 to 191) will disclose that no appraisal of this bankrupt's estate has been made.

Attention is further called to a second suit brought by the trustee in said Superior Court and filed on the 8th day of January, 1919, (Transcript, pages 137 to 152) wherein the said trustee asked that not only the matters set forth in this new action, but also the matters and things prayed for in the first action be determined in it and that all matters in controversy be settled and determined in an **accounting.** In the latter action upon motion of Appellant and Petitioner herein, an injunction which had been served, restraining the foreclosure of the properties involved in the two actions was dissolved. From the order dissolving the injunction the trustee, on January 25, 1919, appealed to the Supreme Court of the State of Arizona. On the Trustee's motion, the judge fixed the amount of a supersedeas bond (Transcript, page 166). The appeal was never perfected (See Transcript, page 167).

To the first action, the Superior Court, on May 17, 1919, (Transcript, pages 135-136) sustained this Appellant's demurrer (Transcript, page 106). On motion of the Trustee (Transcript, page 136) under

date of November 8th, 1919, both actions were **dismissed.**

It is contended that all of the matters and things recited in the two actions were known to the referee; that he knew of the pendency of these two actions and that during all of the time it was necessary for this appellant to feed and take care of the cattle, which constituted a large part of the chattels under mortgage; that it is fair to assume with all the matters and things set forth herein that on November 8th, 1919, with the dismissal of the two actions, that the trustee had abandoned all interest in any and all of the property and things involved in the various matters, so far as the bankruptcy court was concerned and it is further contended that said suits so abandoned show that there existed a **controversy** which could only be adjudicated in a plenary action. It is yet further contended that if the procedure in the Superior Court was the proper procedure and the only one that from the facts could be maintained, that the trustee did abandon all claims, upon dismissing said actions on November 8th, 1919; for if there had been anything due from this appellant and petitioner the same could have been and would have been determined in said actions.

In re Rathman, Supra.

At the time of abandoning the suits in the Superior Court, November 8th, 1919, the statute of limitations had run (Transcript, page 136, paragraph 2; Transcript, page 167, paragraph 2) as to the alleged payments by the bankrupt on Septem-

ber 30th, 1916, (Transcript, page 68) Revised Statutes of Arizona, 1913, Sec. 711-1:

> "There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, all action or suits in courts of the following description:
>
> (1) Actions for debt where the indebtedness is not evidenced by a contract in writing.

At the time of abandoning the suits the foreclosure sale had not been made. The trustee abandoned the suits thus permitting the sale to proceed and stood by waiting for the sale and upon discovering that the sale produced more than was due at the time he, Cowan, took possession of the property, comes into Court and seeks the benefit of said sale without having done any act to preserve or maintain the property up to the time of the sale.

SPECIFICATION III.

A. Nowhere in this record can be found any evidence of any earnings or profits that would warrant the finding that there were earnings or profits.

Without a trial, without evidence, the referee determines that Cowan was negligent in delaying the foreclosure of property in which neither the trustee nor the Court took any interest, and assuming without such evidence, that Cowan

is guilty of negligence, and assuming without such evidence, that there were or ought to have been profits, he determines that they are $3,-439.97, (Transcript of Record, page 85) **and instead fines this appellant and petitioner** such sum and declares on page 87 of the Transcript that "Cowan has received in money and property belonging to the bankrupt estate the sum of $4,705.55 (which sum includes the sum of $1,265.58 referred to in paragraph at top of page 85 of Transcript).

B. The suits referred to herein (See Argument, Specification II) indicate the relation between the parties and clearly set forth that there had been an accounting between the parties, as a result of which an agreement for judgment had been signed. Could the referee arbitrarily decide to waive aside all the dealings between the bankrupt and Cowan and as arbitrarily decide that Cowan had **failed to account for a certain balance.** It is apparent that there were many dealings between the bankrupt and Cowan. It is also shown that under the mortgages something like $1,900.00 was due for attorney's fees (Transcript, page 120, 3rd line from bottom) and that the bankrupt and this appellant had an accounting, (Transcript, page 121) and that the figures of $1,900.00 attorney's fees were reduced to $500.00 at said accounting. Can the referee arbitrarily cancel the agreement for the amount at which judgment was to be entered? The agreement which involves a deduction of about $1,200.00 from the amount claimed by

Cowan against the bankrupt is to be respected. If there was an accounting, it cannot be arbitrarily set aside by the referee.

Corpus Juris (715), see Secs. 355 to 358.

Proof of mistake or fraud must be clearly shown.

Corpus Juris, Page 720, Sec. 371, and cases cited.

SPECIFICATION IV.

See argument under Specification I.

SPECIFICATION V.

The speculative and risky nature of the main items, cattle; the care necessary to preserve them; the fact that as a result of that care and handling and expenditure of time and money (Transcript, page 63) the cattle increased up to the time of foreclosure 30% and that increase was included in the cattle sold, all make it inequitable that the bankrupt's estate should benefit.

See 21 Corpus Juris, 233-Sec. 227.
Handt vs. Heidweyer, 152 U. S. 55.

and see Specification II-A.

The trustee, may not, as in this case, after Cowan had cared for the property, mostly cattle, and at his own expense, where he, the trustee has thus avoided the risks, assert his interest.

See 21 Corpus Juris, Page 225.

For the reasons herein set forth the appellant

and petitioner prays that said case be remanded to the District Court, directing that an order be entered by it that the proceedings invoked by the referee be dismissed for want of jurisdiction in him.

Respectfully submitted,

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